

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Vijender Singh

VISA APPLICANTS: Mrs Manju CHOUDHARY
Master yashika

CASE NUMBER: 1417861

DIBP REFERENCE(S): OSF2013/058678

MEMBER: Michael Cooke

DATE: 4 February 2016

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the second named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.311 of Schedule 2 to the Regulations

Statement made on 04 February 2016 at 4:16pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 10 October 2014 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 10 October 2013 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied that the parties met the definition of spouse.
4. The review applicant/sponsor appeared before the Tribunal on 19 November 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant.
5. The review applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether at the time the visa application was made and at the time of this decision, the visa applicant is the spouse of her sponsoring husband.

SPOUSE/DE FACTO (cl.309.211(2), cl.309.221)

Whether the parties are in a spouse or de facto relationship

8. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. On the evidence (an Indian Marriage Certificate), the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spousal relationship met?

- Financial aspects of the relationship — including joint ownership of assets, and joint liabilities; extent of pooling of financial resources, any legal obligations owed to the other party; any sharing of day-to-day household expenses.

11. The parties live in different countries but apart from this consideration the sponsor has forwarded remittances to the applicant. The Tribunal is satisfied with the financial aspects of the relationship when geographical considerations are taken into account.

- Nature of the household — including any joint responsibility for care and support of children, parties' living arrangements; and any sharing of housework.

12. The parties live in different countries but apart from this consideration the sponsor has visited the applicant many times. He will have joint responsibility for the care and support of her daughter who is a secondary applicant.

- Social aspects of the relationship — including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

13. The social aspects of the parties' relationship are complicated by virtue of the fact that the sponsor's ex-wife and the applicant are sisters. Nevertheless the sponsor has submitted statutory declarations from his ex-wife's brother and a mutual friend which support the marital situation of the parties. The Tribunal extensively questioned the parties in the hearing and is satisfied that they have clarified and rebutted the adverse conclusions of the delegate concerning the genuineness of the relationship. The Tribunal is satisfied with the social aspects of the relationship.

- Nature of persons commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term,

14. The applicant had a turbulent (arranged) Indian marriage that failed and subsequently he fell in love by chance with his ex-wife's sister. It appears from the evidence that his first marriage was a debacle for a number of reasons but basically - incompatibility. The applicant and sponsor have defied their families to marry so in this sense (culturally) they have identified the strength of their commitment to each other. They have spoken both emotionally in the hearing of the companionship and emotional support they draw from each other. The sponsor had a full blown crisis in his personal life and the only person who cared and supported him was the applicant. He was attempting to make his new life in Australia by further educating himself but had no support from his ex-wife. The applicant, on the contrary, has enabled him to re-gather the strength to succeed in Australia and complete his education. The Tribunal is satisfied that they see the relationship as long-term.

- Any other relevant considerations
15. The delegate was not satisfied after a home visit to the applicant's home that the parties were involved in a genuine relationship. The unusual circumstances of the sponsor marrying two sisters alerted the Department to the possibility the relationship was not genuine. The Department personnel appear to not have been aware that the applicant lived in her own house which had been left to her by her deceased husband. Similarly the scandal of their marriage meant that they had to marry away from friends and family members in a different suburb. Hence they did not appear to the delegate to garner the necessary social acceptance by friends and family. The parties have elaborated on and rebutted the adverse concerns of the delegate in the hearing. The Tribunal has had the benefit of additional information supporting the genuineness of the relationship from a close family member and a friend and is satisfied that the adverse conclusions have been answered.
 16. Having considered r.1.15A(3) and the full circumstances of the relationship - the Tribunal finds the parties have a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and they live together or not separately and apart on a permanent basis. They, therefore, meet the requirements of 5F(2)(b)-(d) of the Act and the definition of spouse.
 17. Given these findings the Tribunal is satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
 18. Therefore the visa applicant meets cl.309.211 and cl.309.221.
 19. The Tribunal finds the second named visa applicant is a member of the applicant's family unit pursuant to Regulation 1.14. She has lived with the applicant continuously and is dependent on her. She, therefore, meets cl.309.311 of the Regulations.
 20. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

• **DECISION**

21. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
22. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the second named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.311 of Schedule 2 to the Regulations

Michael
Cooke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).